Zurn Nepco *and* United Building and Construction Trades Council of Camden and Vicinity and its Member Local Unions (UBCTC) and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO. Cases 4–CA–19725, 4–CA–19725–3, 4–CA–19725–4, and 4–CA–20187

March 23, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

On February 1, 1994, Administrative Law Judge H.E. Lott issued the attached decision. The Charging Parties and the General Counsel filed exceptions and supporting briefs. The Respondent filed separate briefs responding to the Charging Parties' and General Counsel's exceptions and supporting briefs. The Respondent filed a motion to dismiss the exceptions filed by the General Counsel. The General Counsel filed an opposition to Respondent's motion to dismiss exceptions and amended exceptions, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified, and to adopt the recommended Order.

The General Counsel excepts to the judge's dismissal of the allegation that employee Ronald Kraus was unlawfully terminated because he refused to cross a picket line. We agree with the judge for the following reasons.

Sometime in June 1991, the UBCTC established a picket line at the Pedricktown jobsite to protest what it alleged were the Respondent's unfair labor practices in terminating and refusing to hire employees. The sign said only ''Zurn Nepco, Unfair Labor Practices'' and stated the name of the Camden County Construction and Building Trades Council as the picketing union. Kraus testified that he refused to cross the picket line and that he telephoned the Respondent's facility to inform them that he would not cross. Kraus was terminated on June 26 for excessive absenteeism. The absentee record entered into the record shows that Kraus missed work on May 15,[3] June 5, 17–20, and 24–26.

The Respondent contends that Kraus, in refusing to cross the picket line to report to work, was acting in violation of the collective-bargaining agreement. The Respondent points to the project agreement between it and the Steelworkers Union containing no-strike provisions,[4] and to an arbitrator's decision dated June 20, 1991, deciding that the employees violated the collective-bargaining agreement when they refused to cross the Charging Parties' picket line. The relevant portions of the arbitrator's decision are as follows:

> Based upon the testimony and evidence presented at the hearing, the Arbitrator finds that (United Steelworkers, Local 15024) shop stewards, Robert Shelton and Daniel Smith, did in fact improperly advise members of Local 15024 not to cross the Camden County Building Trades picket line.
>
> . . . .

[1] The Respondent moves to dismiss the General Counsel's exceptions on the ground that they fail to comply with Sec. 102.46(b)(1)(i) and (iii) and (b)(2) of the Board's Rules and Regulations in that they do not designate any citations to the hearing transcript pages, hearing exhibits, or specify any other ''portions of the record relied on'' to support the exceptions. The Respondent relies on *Ichikoh Mfg.*, 312 NLRB 1022 (1993). In that case, the General Counsel did not file any exceptions as to the relevant issue. Here, exceptions have been filed and the question is whether they should be rejected as failing to comply with the Board's rules. Although the General Counsel's exceptions do not comply in all particulars with Sec. 102.46(b), we accept them because the General Counsel's brief sufficiently designates the portions of the record that General Counsel relies on to support the exceptions. *United Merchants*, 284 NLRB 135 fn. 1 (1987). Accordingly, the Respondent's motion is denied.

[2] The Charging Parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not rely on the judge's statements in reference to the demand for a respirator by employee Patterson that ''it is disingenuous of two habitual smokers to even care about carcinogens.'' We find it is reasonable for any person, including any who smokes, to be concerned about securing the proper safety equipment before entering a potentially hazardous work environment.

In adopting the judge's finding that the Respondent did not act unlawfully with respect to the alleged discriminatees who massed at the Respondent's gate, we find it unnecessary to rely on the judge's statement that it cannot be determined whether these alleged discriminatees were legitimately seeking employment.

[3] The judge inadvertently listed May 5 as a date that Kraus missed work. The absentee record (R. Exh. 21) indicates that the correct date is May 15.

[4] The collective-bargaining agreement has two provisions dealing with prohibition on work stoppages. Sec. 13 provides:

> *Section 13.1, Definition of Grievances*. Should differences arise as to the meaning and application of a provision of this Agreement, an earnest effort will be made to settle such differences immediately in the following manner, during which time there shall be no suspensions, lockouts, interruptions or impeding of work, work stoppages, strikes, sympathy strikes, or other interferences with efficient operations.

Sec. 18 provides:

> *Section 18.1*. Since adequate grievance procedures are provided in this Agreement and since binding arbitration has been agreed to, the Union agrees that it will not engage in, encourage, sanction, or suggest strikes, slowdowns, sympathy strikes, mass resignations, mass absenteeism, or any other similar action which would involve a work stoppage that may disturb or interfere with the orderly conduct of the Employer's operations.

> The Agreement between the parties is clear and requires members of Local 15024 to report for work. If they do not, they will be subject to appropriate discipline, up to and including discharge.
>
> Accordingly, in consonance with the proof, and upon all the foregoing, the undersigned Arbitrator hereby renders, decides, determines, and issues the following:
>
> *AWARD*
>
> 1. The failure of members Local 15024 to report for work on the after June 17, 1991, was a violation of Section 13 of the Agreement.
>
> 2. All members of Local 15024 not presently reporting for work will do so no later than Monday, June 24, 1991. Failure of any member of Local 15024 employed by Nepco to report for work on or after June 24, 1991, will subject that employee to discipline up to and including discharge without further recourse to the grievance procedure of the Agreement.

Thus, the arbitrator concluded that the employees honoring of the picket line,[5] at the urging of the Steelworkers' stewards, violated the no-strike provisions of the collective-bargaining agreement. He further concluded that those employees on strike who failed to report to work on or after June 24, 1991, were subject to discharge. Kraus admittedly failed to report for work on and after June 24, 1991, and, as a result, under the terms of the arbitration award, was subject to discharge.

The Charging Parties urge that the Board should not defer to the arbitrator's award because the strike was in protest of the Respondent's unfair labor practices in discharging and refusing to hire employees. Because we adopt the judge's finding that since the Respondent did not commit any such violations,[6] there is no basis for this contention.

The Charging Parties further assert that the arbitration award involved different unions, different parties, and lacks sufficient parallelism to be entitled to deference by the Board. We disagree. The arbitration award was the result of an arbitration proceeding brought under the terms of the collective-bargaining agreement involving the parties to that agreement. It dealt with whether its provisions prohibited the employees in the unit, including Kraus, from refusing to cross the Charging Parties' picket line. The arbitrator's interpretation that it does contain such a prohibition is a reasonable interpretation. In these circumstances, we see no basis for rejecting the arbitrator's interpretation of the collective-bargaining agreement. *Olin Corp*., 268 NLRB 573 (1984).[7]

We recognize that the arbitration proceeding involved only the Respondent and Steelworkers Local 15024; it did not involve the Charging Parties herein. However, the Charging Parties are acting on behalf of the employees involved herein, and those employees are represented, under Section 9, by Steelworkers Local 15024. Thus, the employees, whose interests are at stake, were represented in the arbitration proceeding.[8] In these circumstances, we consider it appropriate to defer to the arbitral award. Compare *Health Care Employees District 1199E*, 238 NLRB 9, 14 (1978); *Masters, Mates & Pilots*, 220 NLRB 164, 168 (1975).

The General Counsel urges that Kraus' failure to report on and after June 24 did not violate the no-strike provisions because the collective-bargaining agreement was violated only if Kraus' conduct was authorized or encouraged by the Steelworkers. The General Counsel urges that the Respondent made no such showing and that after the arbitrator issued his award, the Steelworkers' stewards urged Kraus to return. The arbitrator found, however, that the stewards, prior to June 20, did encourage members of Local 15024 not to cross the picket line. Although the arbitrator does not specifically name any employees who were encouraged, Kraus was a member of Local 15024 and therefore included in the general group that the Steelworkers' stewards were encouraging to honor the picket line. The arbitrator further found that all refusals by striking employees to return to work on and after June 24 violated the no-strike provisions of the contract and that they would be subject to discipline, including discharge. We find no adequate reason to reject the arbitrator's determination that under the terms of the collective-bargaining agreement these employees, including Kraus, were required to return to work on June 24, and that if any of them failed to do so they could be discharged.

The General Counsel, relying on *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974), contends that the no-strike provisions of the collective-bargaining agreement could not waive Kraus' right not to cross

[5] The arbitrator, in his decision, refers to the Local 15024 stewards as having urged union members not to cross the picket line. Further, he inexplicably refers to the obligation of only Local 15024 members to return to work and he makes no reference to unit members who were not members of Local 15024. However, Kraus was a member of Local 15024 and therefore covered by the arbitrator's award.

[6] There is no contention that the picket line was caused by Respondent's violation of Sec. 8(a)(2) and (1) in ''assisting the Steelworkers in the signing of dues checkoff authorizations.''

[7] Chairman Gould expresses no view on the continued viability of *Olin Corp*., supra.

Member Stephens agrees that deferral to the award is appropriate under both the majority and dissenting views in *Olin Corp*., supra, regarding burden of proof, i.e., he is satisfied that there has been an affirmative showing that all the standards of *Spielberg Mfg. Co.*, 122 NLRB 1080 (1955), have been met.

[8] There is nothing to suggest that they protested that representation.

the picket line because a union cannot waive the right of employees to engage in activity designed to displace it. The General Counsel urges that the picketing was part of the Charging Parties' organizational efforts and that, in the context of an 8(f) prehire agreement, the Respondent cannot use the no-strike clause to prevent employees from refusing to cross the picket line. The picket line here was in protest of the discharge and refusal to hire employees. It was apparently perceived as such because it was supported by at least two of the Local 15024 stewards. In these circumstances, we find that the no-strike provisions were not being used to ban work stoppage whose principal objective was to support a campaign to displace the Steelworkers.[9]

Accordingly, in agreement with the judge, we find that Kraus did not comply with the terms of the arbitrator's award requiring that he return to work on June 24 and that, under these circumstances, his conduct was not protected.[10] Therefore, the Respondent did not act unlawfully when it discharged Kraus for the absenteeism resulting from his refusal to cross the Charging Parties' picket line.[11]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Zurn Nepco, Redmond, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[9] Accordingly, we need not pass on whether a no-strike provision, entered into as a part of a prehire agreement, can be used to prevent employees from engaging in a work stoppage in support of a change of representation.

[10] *Alliance Mfg. Co.*, 200 NLRB 697 (1972).

[11] The Respondent also contended, and the judge found, that there was no picket line present on June 24–26, when Kraus was absent. In view of our findings above, we find it unnecessary to determine whether the picket line was present on and after June 24.

William Slack Jr., Esq., for the General Counsel.
Michael Towers, Charles Caulkins, and *David Kresser, Esqs.*, for the Respondent.
Michael Stapp, Esq., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

H. E. LOTT, Administrative Law Judge. This case was heard in Philadelphia, Pennsylvania, on various dates from June 1 to December 10, 1992, upon unfair labor practice charges and amended charges[1] filed by the Charging Parties from April 19, 1991, to June 1, 1992. The last consolidated complaint and amendment were filed on February 19 and April 13, 1992.

[1] Case 4–CB–6316 and complaint allegations 10 and 15 were severed by Order dated May 29, 1992.

FINDINGS OF FACT

I. JURISDICTION

Zurn Nepco (Zurn) is a Washington State corporation with a place of business in Penns Grove, New Jersey. It is engaged as a general contractor in the building and construction industry. During the past year while it was engaged in the construction of a cogeneration facility at a jobsite in Pedricktown, New Jersey, it purchased and received at the jobsite materials and supplies valued in excess of $50,000 directly from points outside the State of New Jersey.

Although Respondent admitted that the Steelworkers and the Boilermakers Unions are labor organizations, it did not admit that the Construction Trades Council of Camden (UBCTC) (the Council or UBCTC) has that status. Undisputed evidence was offered that the Council is comprised of 29 local unions which represent various types of construction employees. The Council holds weekly meetings attended by representatives of local unions who elect the council members. Council members negotiate labor agreements with various employer contractors and these agreements must be approved by council members.

The Council is usually listed as the contracting party. Council members resolve jurisdictional disputes and other work related problems. They also secure employment for local union members. Local unions must seek council approval before engaging in picketing within the Council's geographic jurisdiction.

Respondent admits and I find that Zurn Nepco is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the International Brotherhood of Boilermakers and the United Steelworkers of America are labor organizations within the meaning of Section 2(5) of the Act. I also find that the United Building and Construction Trades Council of Camden and Vicinity and its Member Local Unions is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

Respondent builds cogeneration plants and until 1988 was known as Atlantic Gulf Western. It is headquartered in Redmond, Washington, and has as many as eight projects in progress throughout the United States employing 1300 employees. In early 1990 Zurn entered into an agreement with Cogeneration Partners of America to construct a cogeneration power plant at a B. F. Goodrich site in Pedricktown, New Jersey. The initial phase of the project was subcontracted by Zurn to local contractors who had labor agreements with various craft unions that were members of UBCTC. Union labor was required by the project agreement. Approximately 50 percent of the construction work was performed under these contracts and this work was completed in early 1991. In February 1991, Zurn began the next phase of construction using direct-hire employees. The project was completed in early 1992.

B. *Alleged Refusal to Hire UBCTC Members*

In September 1990, Zurn contacted UBCTC and entered into negotiations with the Council for a project agreement covering direct-hire employees. These negotiations were unsuccessful. In a letter dated October 18, 1990, Council President Joseph DiRenzo informed Zurn that the membership had rejected the Company's proposal saying that only the UBCTC standard contract would suffice and they would accept nothing less.

After negotiations with UBCTC broke down, Zurn contacted the United Steelworkers of America and Local 15024. The parties entered negotiations and signed a labor agreement on January 17, 1991. The labor agreement is signed by the International president, other International officers, and Manuel Mirailh, district director of Local 15024, located in Edison, New Jersey.

The labor agreement recognized the Steelworkers as exclusive bargaining representative, ''for all persons employed by the employer on the covered job site.'' Jurisdiction covered all new construction performed by craft employees at the Employer's project.

The relevant provisions of the agreement are as follows:

> *Section 5, Union Security*: Employees employed by the employer for a period of eight (8) days continuously or cumulatively, after completion of their probationary period as set forth herein in Section 9 shall be or become on the said eighth (8th) day of employment or eight (8) days after the effective date of this agreement, whichever is later, members of the Union and shall remain members of the Union as a condition of continued employment. Membership in the Union shall be available upon terms and qualifications the same as those applicable at such times to other applicants for membership to the Union.
>
> . . . .
>
> *Section 5.1, Checkoff*: The membership dues, including initiation fees and assessments of the United Steelworkers of America, treasurer of the Union shall be deducted from the wages of such employees who have filed proper assignments with the company and shall be remitted by the company to the United Steelworkers of America, AFL–CIO, c/o Edgar Vall, International Secretary/Treasurer, 5 Gateway Center, Pittsburgh, Pennsylvania 15222.
>
> *Section 6, Hiring*: The Union agrees to furnish, upon request by the Employer, through a referral procedure, duly qualified journeymen and apprentice workers in sufficient numbers as may be necessary to properly execute work contracted for by the employer in the manner and under the conditions specified in this agreement. The employer shall be the sole judge of all applicants and retains the right to reject any applicants for employment referred by the Union or through the referral procedure.
>
> (A) The Union agrees that any journeymen or other workers referred for work shall have the minimum qualifications and/or licenses or credentials set by the company, if any.
>
> (B) The Union agrees that should it be unable to refer workers with the appropriate credentials within 24 hours, the employer may seek workers from any other source.
>
> . . . .
>
> (D) The Union represents that it administers and controls the referrals and it is agreed that these referrals will be made in a non-discriminatory manner in full compliance with federal, state and local laws and regulations which require equal employment opportunities and non-discrimination. Referrals shall not be effected in any way by rules, regulations, bylaws, constitutional provisions or any other aspects of union membership, policies or requirements.
>
> . . . .
>
> *Section 9, Probationary Period*: It is agreed that new employees shall be considered probationary employees for the first seventy-five (75) days of their employment.

In 1987 when Michael Mace assumed the job of manager of human resources, he developed a companywide priority hiring policy which is as follows:

> (1) Consideration is first given to prior Zurn employees.
>
> (2) Consideration is next given to referrals by Zurn managers and supervisors.
>
> (3) Consideration is next given to referrals by current employees, particularly experienced journeymen in the craft needed.
>
> (4) Consideration is next given to unknown quantities with appropriate skills and experience.

According to Mace, this policy was disseminated to all personnel supervisors, including Personnel Supervisor B. J. Malone at that time. It is referred to in a memo to resident managers dated July 13, 1989, and incorporated into the field policy and procedure manual in February 1992.

B. J. Malone testified that he, Project Manager Leon Grier, and Administrative Manager James Kunkel met with Manny Mirailh of Steelworkers Local 15024 and that Malone was led to believe that Local 15024 would be able to fulfill Zurn's labor requirements. However, this did not happen and Mirailh referred Zurn to Ed Overby, who is president of Steelworkers Local 14614 in Charleston, West Virginia. Malone and Grier traveled to Charleston, West Virginia, and met with Overby whose local would be the primary source of labor for the project. Zurn established a drug testing and weld testing facility in that town for referrals. Since Malone had no prior experience with labor agreements, he depended upon Overby to help him to administer the agreement.

Malone was responsible for hiring all construction employees for the Pedricktown project and in that capacity he followed the labor agreement and the Company's priority hiring policy. Normally Malone would fax an employee requisition to the Steelworkers' locals. He also faxed or telephoned his staffing requirements to Local 15024. The local would approve the fax and return to Malone whether or not it could refer an employee. From January 21 to March 6, 1991, Steelworkers Local 14614 furnished 34 of the first 39 employees hired. Local 15024 informed Malone that it could furnish no employees. If the locals could not furnish the requested employees, Malone invoked the 24-hour rule and hired in accordance with company priority policy. From March 7 to April 29, 1991, Malone hired 27 former employees, 21 refer-

rals from Local 14614, 21 cold calls at site, 10 employees from New Jersey Job Service, and 4 referrals from Zurn employees. At the beginning of May 1991, the Steelworkers had exhausted their supply of labor.

Malone testified that when he could get no more employees from the Steelworkers, he followed the Company's priority procedure. He used the following procedure for cold calls. When a prospective employee called the jobsite, Malone would conduct a short interview obtaining the caller's name, phone number, craft qualifications, and experience. If the caller met the requirements for a current opening, he was invited to the jobsite for an interview by Malone and the craft superintendent or a physical examination, drug and weld test was scheduled. If all tests were passed, the employee was given an orientation session on his first day of employment.

Bonnie Bucco testified that she was the receptionist at the Pedricktown jobsite from October 1990 to October 1991 and followed definite instructions given to her by her supervisor, Jim Kunkel. For job seekers calling in, she would transfer the call to Malone. If he was not available, she would take down the callers name, telephone number, and craft and put the message in Malone's mail slot. She never took down union affiliation nor did she ever discuss UBCTC with Malone. When she received more telephone calls than she could handle, she referred the excess to Manny Mirailh's local union. She began this procedure in February or March 1991 and continued it until she was laid off.

When walk-ins approach the security guard, he was instructed to give them Malone's telephone number. No walk-ins were given employment applications. Company procedure was to give employment applications to employees on their first day of employment at the orientation session.

Malone testified that he did not interview job seekers who arrived at the gate without an appointment because he couldn't do that and his other job duties.

According to Malone, job service of New Jersey was contacted before Zurn entered into a labor agreement with the Steelworkers. After he could get no more help from the Steelworkers, Malone hired 13 employees from this service. He hired five helpers and six journeymen before April 18, 1991, and two helpers after that date.

On March 7, 1991, Boilermakers International Representative James Bragan, their attorney, and UBCTC President Joseph DiRenzo met and decided under their ''Fight Back'' strategy to organize the Pedricktown jobsite. On April 16, 1991, DiRenzo sent a letter to Zurn stating that it was engaged in organizing activity at the jobsite. The letter listed certain employees who were organizers for UBCTC. Among those listed were Dennis Deacon and Ernest Patterson.

On April 18, 1991, Bragan, DiRenzo, and several local business managers representing 130 members of UBCTC, who were also present, appeared at the jobsite gate. Bragan told the guard they were from the building trades and asked him to get B. J. Malone because the members would like to file employment applications. The guard informed Bragan that the Company was not taking applications. Bragan then circulated a petition which was signed by 131 members giving their name, telephone number, local union number, and craft. This petition was handed to the guard with a letter from DiRenzo stating that they represented the local craftsmen who were seeking employment at Zurn Nepco and that employment applications should be provided to all craftsmen requesting them. He requested that additional applications be sent to the Building Trades office for distribution to interested craftsmen.

On April 19, 1991, UBCTC filed a petition for an election and charges alleging refusal to hire on April 18, 1991. From April 19 to 30, 1991, three business agents of Building Trades locals called the Zurn jobsite. They identified themselves and asked to speak to Malone. Only Iron Workers' business agent, Sweeney, spoke to Malone who referred him to Steelworkers Local 15024 Director Mirailh. Sweeney talked to Mirailh who promised to get back to him about employment for Sweeney's members, but never did. Carpenters' business agent, James Johnson, talked to Mirailh who stated that he would like to help him but could not do so because of the unfair labor practice charges filed by UBCTC.

On April 23, 1991, Resident Manager Leon Grier issued a memorandum stating that all hiring for the jobsite was to be in accordance with Zurn's Steelworkers contract and that all job seekers were to be sent to Steelworkers Representative Mirailh. After April 23, 1991, the security guard at the jobsite distributed this memo to job seekers who appeared at the gate.

On April 30, 1991, Bragan approached the gate with UBCTC business agents along with William Creden, who is assistant to the director of organizing for the Boilermakers. Creden asked the guard for employment applications. The guard presented Creden with the April 23 memo. Creden requested 200 copies which were provided. Another list of members was prepared to show who was present. These lists contained 180 names.

On May 1, 1991, Grier sent Dorenzo a letter complaining about the mass ''applicants'' at the gate and informing him of the labor agreement the Company had with the Steelworkers Union. Grier said that because of his small staff, the Company couldn't process 50 applicants at one time even if they were accepting applications at the gate. Grier told him they were referring applicants at the gate to the Steelworkers and asked him to do the same.

On May 1, 1991, Bragan led a caravan of over 100 union members to the Steelworkers' office in Edison, New Jersey. Bragan entered the office and announced to secretary Francine Grocki that he represented the Camden Trades Council and had over 100 members outside that wanted to apply for work at the Pedricktown project. Bragan told her that Zurn had referred them to the Steelworkers and he wanted job applications or he wanted his members to sign a referral list. Eventually, Grocki had all the members sign a referral list. After May 1, she took down information about job seekers inquiring about employment at Zurn. However, she never referred any job seekers to Zurn although she constantly received job requisitions from Malone. She did not tell Malone or anyone at Zurn about the referral list or the subsequent job seekers who called in.

On May 13, 1991, the Steelworkers' attorney wrote a letter to UBCTC's president which states:

> In light of Mirailh personal tragedy,[2] I believe it important that I advise you of Local 15024's position.
>
> On or about May 1, 1991, 111 of your members arrived en masse at the Steelworkers' office in Edison.

[2] Mirailh's son died at this time.

> The sheer number of applicants and their behavior intimidated the secretaries. Further, the small size of the office is inadequate to handle that number of job applicants.
>
> The secretaries, doing the best they could do under the circumstances, took each individual's name and have now created a computerized alphabetical listing that is of little or no use to us. We do not know the sequence—who applied in what order—nor do we know each person's skill. Accordingly, if any individual wishes, he may come back to re-apply.
>
> Local 15024 truly wants to provide jobs pursuant to its project agreement with Zurn Nepco. However, we simply can not function if the applicants do not act reasonably and responsibly.
>
> Accordingly, in the future, kindly see that no more than five individuals report per hour. This is necessary to provide for as little disruption as possible. We are aware of our legal obligations, but we can not fulfill them, if applicants appear en masse and intimidate our secretaries.

On May 24, Dorenzo sent a response to the above letter which reads in pertinent part:

> Because of the fact that your secretaries created a computerized alphabetical listing of no apparent use to you, is your problem. The referrals were handed to your secretary in order with Jay Bragan, a pipe welder, fitter on top of the list. This statement, on your part, seems to be another evasive way of avoiding the issue of hiring or considering for hire building trades union affiliated people. The fact of the matter is that we signed your referral list, and each man listed his local union number and what job he was applying for. You obviously are not providing jobs pursuant to your project agreement with Zurn Nepco and, I believe, are continuing to violate federal law.

The letter was never sent to Zurn nor were Zurn officials aware of its contents. However, they were made aware of the situation at the Steelworkers' union hall on May 1, 1991.

All three job applicants who told Malone they were members of the Building Trades Union were hired, following the cold call procedure. One of these employees, Robert Larriu, was asked by Malone if he knew of any workers he could recommend. Larriu referred four or five workers to Malone, all of whom were hired.

In addition to those three, Zurn hired Gerald Slavin, organizer for the sheet metal workers, Bill Murphy, a member of the Boilermakers, Earnest Patterson and Michael Manculich, both paid organizers for the Boilermakers, and others who testified they were hired in accordance with Zurn's stated hiring procedure.

From April 29, 1991, to the end of the job. Zurn hired 35 former employees, 14 employees from Local 14614, 69 employees at site cold calls, and 42 employees referred by Zurn employees.

C. *Alleged 8(a)(2) Violation*

The union-security clause in the labor agreement requires all employees to become members of the union after 8 days of continuous employment or 8 days after their probationary period (75 days). Before Zurn began hiring, Malone met with Mirailh who gave him Steelworkers membership cards and instructed him in the procedure to follow in getting the cards completed. Mirailh instructed Malone to have employees fill out the union card when they were hired or 83 days later and that dues should be checked off in accordance with instructions on the authorization card.

The General Counsel offered the following witnesses:

Milton Harrison testified that he was hired in March 1991 and at his orientation Malone distributed Steelworkers applications. Harrison told Malone he belonged to a labor union at the shipyard and Malone stated this was a Steelworkers job and he had to be a Steelworker to work it. Malone also said he had to become a Steelworkers member after a certain number of days.

Gerald Slavin, sheet metal worker, organizer and Boilermakers member Bill Murphy testified they were hired on April 2, 1991, and Malone told them they had to join the Steelworkers to work the job. That Steelworkers membership was required on the job. Murphy testified that Malone said not to fill out the back of the application until he paid the initiation fee.

UBCTC Organizers Dennis Deacon, John Harkin, and Ernest Patterson testified that when they were hired on April 15, 1991, Malone instructed them to complete the dues-checkoff authorization portion of the Steelworkers' card. Harkin and Deacon recalled Malone saying they didn't have to complete the membership portion until after 70 days of employment. Patterson remembered Malone saying they could complete the Steelworkers application but not to sign it.

Thomas Lucas of Boilermakers Local 667 was hired on April 16, 1991, and testified he completed dues-checkoff authorization side of the Steelworkers card and completed the other side of the card but did not sign it.

Carpenter's organizers Ron Kraus and Ron Jernegan testified that at their orientation on April 2, 1991, Malone told employees that he was being given a hard time by the Trades Council and that employees either sign the Steelworkers' cards or leave.

IBEW member Robert Schumacker testified that when he was hired on August 7, 1991, Malone told employees there would be a $100 initiation fee and that there was a 30-day probationary period before they got their Steelworkers cards which was their (Zurn's) way of getting around the Building Trades.

B. J. Malone testified that during the orientation sessions he told employees to fill out the Steelworkers cards if they wanted to. He couldn't force them to because they had 83 days before initiation fee was due. Some employees questioned whether they had to sign a Steelworkers card. They didn't have to sign the card if they didn't want to. But he did tell them if the initiation fee was not paid by the 83rd day, the Union would instruct him to terminate them. Malone denied telling Jurnegan or Kraus that if employees didn't sign a Steelworkers' card, they should leave. Malone further testified that he always mentioned the 83 days when talking about the Steelworkers' application cards and never mentioned the Camden building trade.

D. *Alleged 8(a)(1) Discharge of Patterson*

Ernest Patterson was a member of the Boilermakers Union and was a paid union organizer at the Pedricktown project. He had frequently been named in unfair labor practice charges filed by the Boilermakers in connection with its ''fight-back'' program. Patterson had worked for Zurn in 1991 in Sterling, Connecticut. Bragan asked Patterson to participate in organizing in the Pedricktown project.

On April 15, 1991, Patterson and another Boilermakers organizer, Michael Manculich, were hired. Patterson and Manculich were being taken to their foreman, Howard Chavis, when Foreman Mike Mills saw them and said he thought Marty Plachard black-balled him in Sterling, Connecticut. Mills said evidently he didn't but he was going to. Manculich heard essentially the same thing.

Mills testified that he knew Patterson from the Sterling project because he got him the job. He also knew Patterson was discharged from that job for refusing to perform any work. When he saw Patterson at the Pedricktown project, he was surprised and said to him, ''I figured you were blackballed.'' Mills denied saying he would blackball Patterson.

Patterson also testified that 4 days after he was hired, he overheard Foreman Chavis tell Foreman Frank Quigley that Patterson was a troublemaker. No one else heard this conversation.

Chavis, who was not employed by Zurn at the time of the trial, denied having such a conversation with Quigley. He also denies saying Patterson was a good employee which is also alleged by Patterson because Patterson had a poor attendance record.

Patterson testified that on the evening of April 29 he observed two employees in the boiler welding steel plates over insulation. Foreman Chavis was nearby.[3] Patterson told these employees the insulation was carcinogenic and urged them to obtain proper safety equipment.

On April 30 Foreman Chavis, noting that Patterson had previously complained about not being assigned Boilermakers work, assigned him and Manculich to weld steel plates over insulation in the boiler.

Patterson testified that he requested proper safety equipment such as a respirator and protective suit. Chavis stated that he did not think any respirators were available but he would get Patterson and his helper a dust mask. When Patterson asked to be assigned a different job if proper safety equipment was not available, Chavis stated he was, ''sick of this shit'' and left the area.

Chavis returned with Boilermaker Superintendent Richard Rhodes. When Patterson again refused to work without proper safety equipment, Rhodes summoned Superintendent David Gale who discharged Patterson because he again refused to work.

Patterson testified that Gale told him the only reason Patterson was there with the Boilermakers was to cause him problems and that Patterson was a troublemaker. Patterson also testified that he is a regular cigarette smoker and that cigarettes contain carcinogens which are damaging to his health. Michael Manculich who is also a boilermaker and cigarette smoker testified that he heard these conversations. He also testified that he had worked with Patterson both before and after Patterson's discharge and that he and Patterson read each other's affidavits before testifying. He also stated many times that Patterson wanted safety equipment for himself before going to work in the boiler.

Howard Chavis testified that Patterson was not assigned to his crew on April 29 and he did not overhear Patterson say anything about safety.

Foreman Chavis, Boilermaker Superintendent Rhodes and Project Superintendent Gale all testified that on April 30 Patterson was assigned to work in the boiler structure with other employees. He requested a respirator from Chavis who went to the safety department to get it. Chavis was told by safety personnel to send Patterson over so he could be properly fitted for the respirator in accordance with Zurn policy and Federal regulation. Respirators were available and Chavis denies telling Patterson only dusk masks were available. Chavis met Rhodes on the way to the safety department and told him what he was doing.

Rhodes then met Patterson in the smoking pen and asked him why he was not working. Patterson said he needed a respirator but said nothing about safety conditions in the boiler. When Patterson was informed that Chavis was on his way to the safety office to check on respirators, Patterson told Rhodes that their was no need, he wasn't going in the boiler anyway.

Rhodes contacted Gale who came to the smoking pen. Rhodes told Gale that Patterson had refused to be fitted for a respirator. Gale asked Patterson if that was true and Patterson said yes, that he wouldn't use a respirator even if offered.

Gale asked Patterson if he was going to return to work and Patterson said no, he was going to stay in the smoking pen. Gale then discharged Patterson. The same day Rhodes made a written memorandum to the file (R. Exh. 27) which states similar facts. These witnesses assert that Patterson did not mention anything about a respirator, nor did he mention working some place else or that the boiler was unsafe.

E. *Alleged Discriminatory Discharge of Dennis Deacon and Ronald Kraus*

Dennis Deacon testified he is a member of the Boilermakers Union and was requested by Business Agent Joseph Mangione to seek employment at Zurn so that he could help organize the employees. At orientation on April 15, 1991, Malone asked them to fill out the front of the card (checkoff authorization) but not the back. In 70 days, they would be required to sign it if, ''we decided to join the Steelworkers' Union.''

Deacon stated that on April 22, he was told to report to Malone who told him that if he didn't sign the card and join the Steelworkers, he couldn't work there. Deacon refused to sign and was fired. The next day Deacon returned to the jobsite to pick up his tools and his foreman, Terry Bennett, asked him why he was not working. Deacon told him he had been fired and Bennett said nothing.

B. J. Malone testified he received a telephone call from Manny Mirailh who asked him for all the Steelworkers' cards that had been signed. In going through the cards, he noticed that Deacon's card was not signed. On April 22 Malone sent for Deacon and told him he hadn't signed his Steelworkers' card. Deacon refused to sign it. Malone testified that he told Deacon that he had to sign it sooner or later.

[3] General Counsel witness Thomas Lucas does not remember any supervisor being present, other witnesses did.

He had 83 days. Deacon said he was not signing the card. Malone said, ''fine but after eight-three days, if you don't sign it and you don't pay the initiation fee, you will be terminated.'' Malone denied pulling his brass which means automatic termination. He also denies telling Deacon he was fired. Malone stated that he has no authority to discharge employees.

Terry Bennett testified that he saw Deacon on April 23, and Deacon told him he had been fired. Bennett immediately went to Malone and asked him if he had discharged Deacon. Malone said no. Bennett returned to Deacon and informed him that he had not been discharged and that he should go to work. Deacon told Bennett that he, and employee Harkins had a weld test with another employer later that day. He never returned to work and was discharged on April 25 for failure to come to work. This is reported on his termination notice dated April 25, 1991.

John Harkins, a Boilermakers Union member and an employee of Zurn, was with Deacon when Malone talked to him. He stated that Malone told him that he couldn't work there if they didn't sign Steelworkers cards. Both refused to sign cards, but Harkins does not confirm that Malone fired them. Harkins further testified that they went to the jobsite the next day and were told that it was okay to work. Harkins said he was sick and went home.

Ronald Kraus was a paid union organizer for Carpenters' Local 1578 while working for Zurn. He was referred to Zurn by the Steelworkers and signed a Steelworkers' card during orientation. His main purpose in working for Zurn was to see how Zurn was hiring and what type of people the Company was hiring.

Kraus testified that UBCTC established a picket line at the Pedricktown jobsite in June 1991. He called Malone's secretary and told her he would not cross the picket line. He never returned to work except to pick up some tools some 2 weeks later.

Respondent contends they discharged Kraus on June 26 because he never returned to work after the picketing ceased. His absentee record shows he missed work on May 5 and on June 5, 17–20, and 24–26.

Respondent offered into evidence the project agreement containing a no-strike clause. It further offered an arbitrator's decision dated June 20, interpreting this clause as requiring the members of the Steelworkers to report to work. The arbitrator further stated that if members did not report to work by June 24, 1991, they could be discharged. Kraus ignored this ruling although he was a Steelworkers member and Respondent asserts this reason alone justified his discharge.

F. *Other 8(a)(1) Allegations*

Bill Murphy, an employee of Respondent from April 1, 1991, to the last of May 1991 testified that sometime during that period his supervisor, Rick Adams, approached him about taking a pipe welding test. Murphy said there were 100 pipe welders at the gate and why didn't he hire them. According to Murphy, Adams said those men were here to organize the job and he wasn't going to hire them.

Charles ''Rick'' Adams testified that he was pipe foreman at the Pedricktown project and had been a member of the Plumbers' and Pipefitters' Union and he had no objection to the Building Trades Union. He further denied saying to anyone, including Murphy, that he would not hire Building Trades supporters.

III. ANALYSIS AND CONCLUSIONS

A. *Alleged Refusal to Hire UBCTC Members*

Zurn's hiring procedure was in place long before the Pedricktown project began and I find that Respondent followed that procedure in almost all cases. Moreover, I find that under the collective-bargaining agreement, preference had to be given to Steelworkers referrals. I further find that Respondent followed its ''cold call'' procedure and when UBCTC members followed that procedure, they were considered for employment or hired. The evidence discloses that many Building Trades members were hired, including organizers when they followed the correct hiring procedure.

I find that Steelworkers Local 15024 did not refer UBCTC members and Respondent can not be held responsible for this failing.

When UBCTC members massed at Respondent's gate on April 18 and 30, 1991, they were represented by UBCTC officers. I find that Respondent had no obligation to deal with these officers. In fact, it would have been in violation of the labor agreement with the Steelworkers had they done so. Moreover, Respondent was not equipped to handle that many applicants. Finally, handing a list of job applicants to Respondent did not comply with any procedure established by Respondent.

I also find that employment applications were only distributed at time of hire, during orientation.

It should also be noted that most discriminatees did not apply for a job individually but acted through an official of their union. Since this method was precluded by the labor agreement, it could be concluded that they never applied for a job with Respondent. Since almost all discriminatees never testified, it can not be determined whether or not they were legitimately seeking employment.

Accordingly, I find that Respondent met its *Wright Line* burden by establishing that it would not have hired these UBCTC members, notwithstanding their union affiliation. In summary, I find clear evidence that had a large group of nonunion jobseekers massed in front of Respondent's gate, they would have been treated in the same manner that was accorded the UBCTC members. Therefore, I recommend dismissal of this allegation.

B. *Alleged 8(a)(2) Violation*

General Counsel's brief states the issue relating to this allegation as whether or not Respondent coerced employees into signing dues-checkoff authorizations. The checkoff authorization in this case is the standard variety and there is no allegation that it is unlawful. There also is no allegation that anyone was forced to join the Union in violation of Section 8(a)(2) of the Act. This allegation deals solely with dues checkoff.

In support of this allegation, General Counsel presented witnesses whose testimony was confusing, contradictory, and in some cases supportive of Respondent's defense. Therefore, I credit Malone's testimony and find that he did not coerce anybody into signing a dues-checkoff authorization. However, after reviewing the testimony of Malone, as well as General Counsel's witnesses, I find that during orientation,

Malone routinely gave employees many forms to complete, including the dues-checkoff authorization. Nor was any alternative form of payment mentioned. From the testimony I conclude that it was expected that employees would sign the authorization and, in fact, most did. However, I also find that it was not a deliberate attempt to assist the Union. Malone admitted he didn't know what he was doing and looked to the Union for guidance in this tangled area. I conclude, he did the best he could under difficult circumstances. Unfortunately, that's not good enough.

Accordingly, I find that Respondent violated Section 8(a)(1) and (2) of the Act by engaging in illegal assistance in the signing of dues-checkoff authorizations. *Mode O'Day Co.*, 280 NLRB 253 (1987), modified at 290 NLRB 1234 (1988).

General Counsel, at page 19 of the transcript, requested as a remedy merely a cease-and-desist order. Apparently all other aspects of this allegation had been settled with the Steelworkers' Union. I would not recommend anything more in any event.

C. *Discharge of Patterson*

After reviewing all the evidence and assessing the credibility of the witnesses, I credit the Respondent's witnesses and find that Patterson was discharged for insubordination and not for any concerted activities. It is quite apparent, from the facts, that Patterson did not care about working for Respondent. What he cared about was organizing the employees. And for that purpose he needed an issue and confrontation. Any issue would due and if the facts didn't fit the unfair labor practice—change the facts and change the allegation. From April 30, 1991, until January 13, 1992, the allegation was discharged for union activities. After January 13, 1992, the allegation changed to concerted activities. If this had been just a rank-and-file employee, the change in allegations would be understandable, but Patterson was an experienced organizer and the facts were stretched to the breaking point in order to fit the allegation.

Furthermore, I find that Patterson did not engage in concerted activities. He demanded a respirator for himself and it really didn't matter whether the Company provided it or not, he wanted a confrontation. Moreover, it is disingenuous of two habitual smokers to even care about carcinogens. Therefore, I find that the testimony of Patterson and Manculich and the others to be self-serving, untruthful and not worthy of belief.

Accordingly, I find that Respondent satisfied its *Wright Line* burden by establishing that it would have discharged Patterson notwithstanding his alleged concerted activities and recommend dismissal of this allegation.

D. *The Discharge of Deacon and Kraus*

I do not credit the uncorroborated testimony of Deacon when he says he was discharged by Malone for refusing to sign a Steelworkers' card. Instead, I credit the testimony of Malone and Bennett who were very credible witnesses. Even John Harkins does not support Deacon's testimony that he was discharged. Moreover, on the facts given by Deacon, Harkins, himself, was not discharged. He merely declared himself sick and walked off.

Likewise, I find that Kraus simply failed to return to work after the picket line was removed, in violation of the arbitrator's ruling and company policy. This ruling and policy applied to all Steelworkers members including Steelworkers union stewards. Accordingly, I find that Respondent satisfied its *Wright Line* burden of showing that it would have discharged Kraus and Deacon notwithstanding their union activities.

E. *Other Alleged 8(a)(1) Activity*

I discredited Patterson's testimony for reasons stated above and credit the denial of Mills and find that Mills did not threaten to blackball Patterson.

I further find that the uncorroborated testimony of Patterson that Chavis called him a troublemaker is not credible. I discredit the uncorroborated testimony of Bill Murphy over the denial of Adams that he would never hire UBCTC members.

In summary, I recommend dismissal of all 8(a)(1) allegations.

F. *Union Animus*

General Counsel offered some evidence of union animus. Much of it was not considered because of dismissal of the 8(a)(1) allegations. The remainder which consists of certain remarks made against the Building Trades Council are far overshadowed by the following Respondent conduct.

At the outset, Respondent sought out recognized and bargained in good faith with UBCTC and the Steelworkers Union. It signed a labor agreement with the Steelworkers and abided by that agreement. In so doing, it had amicable relations with the Steelworkers Union. It appears that the UBCTC did everything in its power to disrupt the project at Pedricktown in order to gain recognition—something it had in the first place.

Short of animus, it is understandable that Zurn management vented its frustration at having its project turned into a battleground.

Under the circumstances, I can not find, and the evidence does not support a finding that Respondent harbored antiunion animus.

CONCLUSIONS OF LAW

1. Respondent Zurn Nepco, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Boilermakers, United Steelworkers of America, and the United Building and Construction Trades Council of Camden are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Zurn Nepco violated Section 8(a)(1) and (2) of the Act by assisting the Steelworkers Union in the signing of dues-checkoff authorizations.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. All other allegations are dismissed.

REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Zurn Nepco, Inc., Redmond, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting the Steelworkers Union by encouraging our employees to sign dues-checkoff authorization as part of our employment procedure.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at all your current projects copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT assist the Steelworkers Union by encouraging our employees to sign dues-checkoff authorizations as part of our employment procedure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ZURN NEPCO, INC.